IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1453-15

HENRY RICHARD BULLOCK, JR., Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTEENTH COURT OF APPEALS
HARRIS COUNTY**

NEWELL, J., filed a dissenting opinion, in which KELLER, P.J., and KEEL, J., joined.

O P I N I O N

In this case, a jury convicted Appellant of theft of a delivery truck. Appellant testified that he broke into the delivery truck to steal items inside it, but he denied ever intending to steal the truck or pressing on the gas or brake pedals to try to start to move the truck. On original

submission, this Court held that Appellant was entitled to a jury instruction on the lesser-included offense of attempted theft because

> the jury could have rationally determined that appellant was not guilty of theft of the truck and was guilty only of attempted theft if (1) it believed the evidence that appellant was inside the truck without consent to be there and that his presence inside the truck and immediate flight from it when he was discovered there showed his intent to steal it, (2) it also believed appellant's testimony denying that his foot was on the pedals and stating that he did not turn on the engine or attempt to start or move the truck, and (3) it disbelieved appellant's testimony that he intended to steal only cash or electronics from the cab.

Bullock v. State, ___ S.W.3d ___, 2016 WL 7900079, at *4 (Tex. Crim. App. Dec. 14, 2016). That is, the State proved that Appellant committed theft of a vehicle, but the Court held that Appellant was entitled to a jury instruction on attempted theft because Appellant denied pressing the gas or brake pedals.

I agree that it is the jury's province to decide which parts of the evidence to believe. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) ("The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side."). And, I agree that a defendant is entitled to a jury instruction on a lesser-included offense even if the evidence he presents in support of it is strong, weak, unimpeached, or contradicted. *Rousseau v. State*, 855

S.W.2d 666, 672 (Tex. Crim. App. 1993). The threshold for such an instruction is admittedly low. *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011).

But the evidence presented must be a valid, rational alternative to the greater offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011). The evidence presented must permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.* This analysis requires examining all the evidence admitted at trial, not merely plucking a statement made by the defendant out of the record and examining it in a vacuum. *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000). A defendant's testimony that he committed no offense, or testimony that otherwise shows that no offense occurred at all, is not adequate to raise the issue of a lesser-included offense. *Lofton v. State*, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001).

Here, the Court has plucked one sliver of a defendant's testimony out of the record and examined it in isolation. According to the Court, Appellant was entitled to a jury instruction on attempted theft because the jury could have believed the portion of Appellant's testimony that he did not press the gas or brake pedals on the truck. Even more problematic, this same jury was also supposed to rationally disbelieve the

reason Appellant himself gave for not pressing the gas or brake pedals on the truck: he was not attempting to steal the truck. While Appellant may have testified to alternative facts, they were not a valid, rational alternative to the offense of theft of a vehicle. Appellant denied attempting to steal the truck, yet we held that he was entitled to a jury instruction on attempting to steal the truck.

That is why I agree with both the trial court and the court of appeals. I would leave for another day the philosophical questions about what amounts to an act in furtherance of appropriation of a truck and whether there can even be an offense of attempted theft. Appellant denied committing the lesser-included offense. *Lofton*, 45 S.W.3d at 652. That is not enough to warrant a jury instruction. I would grant rehearing and affirm the court of appeals holding to that effect. Because the Court does not, I dissent.

Filed: March 1, 2017

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